

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BARRY MICHAELS,
43 Diamond Run Street
Las Vegas, NV 89148,
Plaintiff,

v.

MATTHEW G. WHITAKER, IN HIS
OFFICIAL CAPACITY,
950 Pennsylvania Avenue, N.W.,
Washington, D.C. 20530;

ROD J. ROSENSTEIN, IN HIS
OFFICIAL CAPACITY,
950 Pennsylvania Avenue, N.W.,
Washington, D.C. 20530;

NOEL J. FRANCISCO, IN HIS
OFFICIAL CAPACITY,
950 Pennsylvania Avenue, N.W.,
Washington, D.C. 20530;
Defendants.

Case No. 18-cv-2906

AND

UNITED STATES OF AMERICA *ex rel.*
BARRY MICHAELS,
43 Diamond Run Street
Las Vegas, NV 89148,
Plaintiff,

v.

MATTHEW G. WHITAKER, IN HIS
INDIVIDUAL CAPACITY,
950 Pennsylvania Avenue, N.W.,
Washington, D.C. 20530,
Defendant.

* * * * *

AMENDED COMPLAINT

1. Plaintiff Barry Michaels seeks declaratory and injunctive relief against Matthew G. Whitaker in his official capacity, and a writ of *quo warranto* against Mr. Whitaker in his individual capacity, to prevent him from exercising authority as Acting Attorney General. Mr. Whitaker's appointment violates the Constitution and federal statutes, and he is directly involved in litigating against plaintiff before the United States Supreme Court. *Michaels v. Whitaker*, No. 18-496 (S. Ct. Jun. 27, 2018). He is also the only officer the Government recognizes as the official who can act on plaintiff's request that the Attorney General seek a writ of *quo warranto* against Mr. Whitaker.

2. An immediate injunction enjoining Mr. Whitaker from supervising the Department of Justice's response to plaintiff's pending petition for writ of certiorari in the Supreme Court is necessary—the response is due next Monday, and plaintiff will be irreparably injured if the Government is allowed to file with Mr. Whitaker at the helm. Given the extraordinarily short time, plaintiff respectfully submits that the Court expedite consideration of the matter. 28 U.S.C. § 1657. An injunction is also necessary to ensure that a lawful Acting Attorney General act on plaintiff's request to seek a writ of *quo warranto* against Mr. Whitaker.

3. Plaintiff further seeks declaratory and injunctive relief against Rod J. Rosenstein, in his official capacity, to assume the Attorney General's ultimate supervision of plaintiff's Supreme Court case, and Noel J. Francisco, in his official capacity, to prevent him from consulting with anyone other than Mr. Rosenstein as Acting Attorney General regarding plaintiff's Supreme Court case. Because it is likely that Mr. Whitaker was previously directly involved in the Supreme Court litigation, plaintiff requests an injunction that Mr. Rosenstein and Mr. Francisco reassess the petition and merits of the case, exclusive of any involvement by Mr. Whitaker.

4. Plaintiff further seeks declaratory and injunctive relief that only Mr. Rosenstein may decide whether to act on plaintiff's request, made to the Acting Attorney General pursuant to D.C. Code § 16-3502, that the Acting Attorney General seek a writ of *quo warranto* to be issued against Mr. Whitaker that he is not the Acting Attorney General. *See* Exhibit, *infra*. This Court's resolution of who is the lawful Acting Attorney General is necessary to plaintiff's request that the Acting Attorney General seek such writ on plaintiff's behalf. For obvious reasons, plaintiff will be irreparably harmed if Mr. Whitaker is permitted to make the determination whether to seek the writ against himself.

5. Plaintiff brings his causes of action pursuant to this Court's equitable jurisdiction, *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015), as well as the federal *quo warranto* statute, D.C. Code §§ 16-3501–16-3503; *see SW Gen., Inc. v. N.L.R.B.*, 796 F.3d 67, 81 (D.C. Cir. 2015), *aff'd*, 137 S. Ct. 929 (2017); *Andrade v. Lauer*, 729 F.2d 1475, 1499 (D.C. Cir. 1984); *see also Acting Officers*, 6 Op. O.L.C. 119, 122 (Jan. 27, 1982) (“As a rule, the authority of *de facto* officers can be challenged only in special proceedings in the nature of *quo warranto* brought directly for that purpose.”). The Court has authority to issue a declaratory judgment under 28 U.S.C. §§ 2201-2202, preliminary and ultimate injunctive relief in its equitable discretion, *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 32 (2008), and a writ of *quo warranto* under D.C. Code § 16-3503, *see SW Gen.*, 796 F.3d at 81.

JURISDICTION

6. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331. Venue is appropriate pursuant to 28 U.S.C. § 1391.

PARTIES

7. Plaintiff Barry Michaels is a natural citizen of the United States, residing in Las Vegas, Nevada.

8. Defendant Matthew G. Whitaker is the former Chief of Staff to U.S. Attorney General Jefferson B. Sessions III, a position that does not require Senate confirmation. Mr. Whitaker was unlawfully appointed Acting Attorney General on November 7, 2018, while plaintiff's petition for a writ of certiorari was pending. By operation of Supreme Court Rule 35, Mr. Whitaker was automatically substituted as a respondent in plaintiff's Supreme Court case.

9. Defendant Rod J. Rosenstein is the Senate-confirmed Deputy Attorney General of the United States. Under the Attorney General Succession Act, 28 U.S.C. § 508, he automatically acceded to the post of Acting Attorney General upon the resignation of Mr. Sessions. By statute, the Attorney General and the Solicitor General "shall conduct and argue suits and appeals in the Supreme Court . . . in which the United States is interested." 28 U.S.C. § 518. By regulation, the Solicitor General must consult with the Attorney General when the Department of Justice or the Attorney General himself is concerned in the Supreme Court case. 28 C.F.R. § 0.20.

10. Defendant Noel J. Francisco is the Solicitor General of the United States. By regulation, the Attorney General has delegated the conduct, or assigning and supervising, of Supreme Court cases in which the United States has an interest to the Solicitor General, who must consult "with each agency or official concerned," 28 C.F.R. § 0.20—in plaintiff's Supreme Court case, the lawful Acting Attorney General.

FACTUAL ALLEGATIONS

11. Plaintiff is a convicted non-violent felon. He brought his original action in federal district court in Nevada seeking to invalidate 18 U.S.C. § 922(g)(1) as unconstitutional, naming, as

relevant here, former U.S. Attorney General Loretta Lynch in her representative capacity. *Michaels v. Lynch*, No. 216CV00578JADPAL, 2017 WL 388807, at *1 (D. Nev. Jan. 26, 2017). The district court dismissed the complaint, *id.* at *2-3, and the U.S. Court of Appeals for the Ninth Circuit affirmed on November 3, 2017, *Michaels v. Sessions*, 700 F. App'x 757, 758 (9th Cir. 2017) (per curiam). While the case was pending before the court of appeals, Mr. Sessions was automatically substituted as a defendant under Fed. R. App. P. 43(c)(2), in his representative capacity as Attorney General of the United States. *Id.* at n.*.

12. After the Ninth Circuit denied plaintiff's petition for rehearing and rehearing en banc, plaintiff filed a petition for a writ of certiorari in the U.S. Supreme Court, seeking review of when, among other things, an as-applied challenge to the constitutionality of a felon disarmament law may be brought, a question on which the circuit courts are split. *See* Petition for Writ of Certiorari at 1, 12-15, *Michaels v. Whitaker*, No. 18-496 (S. Ct. Jun. 27, 2018).

13. On November 7, 2018, while plaintiff's petition for a writ of certiorari was pending, Mr. Sessions submitted his resignation as Attorney General to President Trump. *See* Letter from Jefferson B. Sessions III to President Donald J. Trump (Nov. 7, 2018), *available at* <https://cnn.it/2SVkdaQ> (last accessed Dec. 11, 2018). Shortly thereafter, President Trump purported to appoint Mr. Whitaker as the Acting Attorney General. *See, e.g.*, Donald J. Trump (@realDonaldTrump), Twitter (Nov. 7, 2018, 11:44 AM), <https://bit.ly/2STEopE>. Pursuant to Supreme Court Rule 35, Mr. Whitaker was then automatically substituted as the respondent in the Supreme Court case.

14. The Attorney General determines when not to enforce federal statutes on the ground that they are unconstitutional, and has plenary authority over all federal litigation in which the Government is a party. *See, e.g.*, 28 U.S.C. §§ 503, 509-19, 530D; 50 U.S.C. § 1804. And under

D.C. Code § 16-3502, it is up to the “Attorney General of the United States or the United States attorney” whether to “institute a proceeding” for writ of *quo warranto* “on the relation of a third person.” Thus, only the proper Acting Attorney General may oversee the Government’s response to plaintiff’s petition for a writ of certiorari, decide whether to defend against plaintiff’s constitutional claim, and decide whether to act on plaintiff’s request that the Attorney General seek a writ of *quo warranto* against Mr. Whitaker.

15. By statute, the Attorney General and the Solicitor General “shall conduct and argue suits and appeals in the Supreme Court . . . in which the United States is interested.” 28 U.S.C. § 518. By regulation, the Attorney General has delegated the conduct, or assigning and supervising, of Supreme Court cases in which the United States is interested to the Solicitor General, who must consult “with each agency or official concerned.” 28 C.F.R. § 0.20. Because the Government believes Mr. Whitaker is the lawful Acting Attorney General, and he was substituted as a respondent in plaintiff’s Supreme Court case, there is a substantial prospect that Solicitor General Francisco consulted with him as to the litigation. However, Mr. Rosenstein is the lawful Acting Attorney General, and thus Solicitor General Francisco should have consulted with him instead, as required by law.

16. For the reasons set forth in the motion and memorandum at DE 2, 3, the appointment of Mr. Whitaker as Acting Attorney General violates the Appointments Clause of the Constitution, U.S. Const. art. II, § 2, cl. 2, and is not authorized by the Vacancies Act, 5 U.S.C. § 3345 *et seq.* Under the Attorney General Succession Act, 28 U.S.C. § 508, Mr. Rosenstein, not Mr. Whitaker, is the proper party to oversee the Government’s response to plaintiff’s petition for a writ of certiorari and decide whether to act on plaintiff’s request that he seek a writ of *quo warranto* against Mr. Whitaker. Plaintiff is injured not only because Mr. Whitaker is overseeing the case

and plaintiff's *quo warranto* request, but also by the enforcement of 18 U.S.C. § 922(g)(1), and the Attorney General's refusal to agree that certiorari should be granted and he should win on the merits.

17. In its response to plaintiff's motion for substitution in the Supreme Court, the Government asserted that the Court did not have the authority to resolve the issue. Response to Motion to Substitute, *Michaels v. Whitaker*, No. 18-496 (S. Ct. Nov. 26, 2018).

CLAIM I: INJUNCTION UNDER *ARMSTRONG*

18. Plaintiff realleges and incorporates herein by reference every allegation and paragraph set forth above.

19. An injunction is warranted because plaintiff has shown that Mr. Whitaker's appointment is unlawful, allowing him to act as Attorney General will cause plaintiff irreparable injury, the balance of hardships are in plaintiff's favor, and the appointment of the appropriate Acting Attorney General according to the requirements of the Constitution and U.S. Code is of immense public interest due to the Attorney General's plenary authority over federal litigation, as well as substantial policymaking and oversight power.

20. This Court has authority to issue an injunction against a "federal official[]" for "violations of federal law." *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015) (citing, e.g., *Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 110 (1902) (suit to enjoin Postmaster General from withholding mail in violation of federal statute)). Moreover, plaintiff may bring a "collateral attack" on Mr. Whitaker's authority because plaintiff brings his action "at or around the time that the challenged government action is taken"—the Government's response to plaintiff's petition for certiorari is due Monday and plaintiff's *quo warranto* request was made today—and "the agency or department involved has had reasonable notice under all the

circumstances of the claimed defect in the official's title to office"—plaintiff has already challenged Mr. Whitaker's authority in the Supreme Court, the parties have engaged on the merits of the issue, and Mr. Whitaker faces similar challenges all across the country. *See SW Gen., Inc.*, 796 F.3d at 81 (quoting *Andrade*, 729 F.2d at 1499).

21. Plaintiff will be irreparably harmed if the Government is permitted to file its response to the petition for a writ of certiorari under the supervision and involvement of Mr. Whitaker. Plaintiff will also be irreparably harmed if the Solicitor General is permitted to file the response having consulted with Mr. Whitaker, and without the involvement of Mr. Rosenstein, who is required to oversee plaintiff's Supreme Court litigation as the lawful Acting Attorney General.

22. Although not necessary for Plaintiff's claim, on information and belief, it is also likely that Mr. Whitaker is already directly involved in the case and that Mr. Francisco has consulted with him given plaintiff's high-profile challenge to Mr. Whitaker's authority in the Supreme Court, which has been widely reported in the press. *See, e.g.*, Devlin Barrett, *Whitaker's Opponents Take Legal Challenge to Supreme Court*, The Washington Post (Nov. 16, 2018), <https://wapo.st/2UDymKy>; Associated Press, *Challenge to Matthew Whitaker's Appointment as Acting Attorney General Seeks Supreme Court Ruling* (Nov. 17, 2018), <http://bit.ly/2B8JOoJ>. And once the Government files its response, it is likely to argue that this issue is moot.

23. Moreover, on information and belief, Mr. Whitaker is likely to be personally involved in the decisionmaking regarding the position set forth by the Department of Justice in the Supreme Court. *See, e.g.*, Jeff Murdock, *Whitaker Unveils Initiative to Stop 'Trigger-Pullers and Gun Traffickers Who Supply Them' in Memphis*, The Washington Times (Nov. 28, 2018), <http://bit.ly/2rug1lY>. Previous Attorney Generals have inserted themselves directly into cases involving challenges under the Second Amendment, like plaintiff's. *See, e.g.*, Linda Greenhouse,

Justice Dept. Reverses Policy on Meaning of the Second Amendment, N.Y. Times (May 7, 2002), <https://nyti.ms/2UAvi1O>; Dane Eggen, *Ashcroft: Gun Ownership and Individual Right*, Washington Post (May 24, 2001), <https://wapo.st/2QtH0wX>. For example, former Attorney General John Ashcroft expressed positive views as to other subsections of the very statute plaintiff challenges as unconstitutional. John Ashcroft, *In re United States v. Emerson*, Office of the Attorney General (Nov. 9, 2001) (“I am pleased that the decision upholds the constitutionality of 18 U.S.C. 922(g)(8)”), available at <http://bit.ly/2PuoWgN>.

24. Plaintiff is harmed by Mr. Whitaker’s past involvement in the case as well. Injunctive relief against defendants Noel Francisco and Rod Rosenstein is necessary to ensure that the lawful Acting Attorney General and Solicitor General will reassess the petition and merits of plaintiff’s Supreme Court case, pursuant to 28 U.S.C. § 518 and 28 C.F.R. § 0.20. If this Court determines that Rod Rosenstein, the Senate-confirmed Deputy Attorney General, is the correct Acting Attorney General, plaintiff will ask Mr. Rosenstein to acquiesce to the petition for a writ of certiorari and agree with plaintiff on the merits. Petitioner has not made that request of Mr. Whitaker only because of plaintiff’s firm belief that Mr. Whitaker was not lawfully appointed.

25. Plaintiff should prevail even if the correct official would exercise his oversight and decisionmaking authority in the exact same way as Mr. Whitaker. The fact that an unconstitutional appointee is making the decisions is itself a cognizable harm. *Landry v. F.D.I.C.*, 204 F.3d 1125, 1131 (D.C. Cir. 2000) (collecting authorities). Plaintiff is entitled not only to litigate his petition against the proper Acting Attorney General, Rod Rosenstein, but also to have Mr. Rosenstein make the determination under 28 U.S.C. § 530D whether to defend the challenged statute.

26. The balance of equities and public interest favor the Court issuing an injunction. The Government has no valid interest in vesting decisionmaking authority in an unlawfully appointed

official. Mr. Rosenstein, who was confirmed by the Senate and who has seamlessly served as Acting Attorney General in various circumstances, would assume Mr. Whitaker's responsibilities for this case.

CLAIM II: INJUNCTION UNDER *ARMSTRONG*

27. Plaintiff realleges and incorporates herein by reference every allegation and paragraph set forth above.

28. Under D.C. Code § 16-3502, “[t]he Attorney General of the United States or the United States attorney may institute a proceeding pursuant to this subchapter on his own motion or on the relation of a third person.” Pursuant to that provision, plaintiff has sent a request to the Acting Attorney General to seek a writ of *quo warranto* to be issued against Mr. Whitaker on plaintiff's behalf that Mr. Whitaker is not the Acting Attorney General. Under D.C. Code § 16-3503, only if “the Attorney General . . . refuses to institute a *quo warranto* proceeding” upon plaintiff's request, may plaintiff “apply to the court by certified petition for leave to have the writ issued.”

29. The Department of Justice—under the supervision of Mr. Whitaker—has taken the position that Mr. Whitaker is the lawful Acting Attorney General. Presumably, then, Mr. Whitaker will make the decision whether to seek a writ of *quo warranto* against himself. It is essentially a foregone conclusion that Mr. Whitaker will decline to seek the writ, exercising authority he does not lawfully have. *See, e.g., Andrade*, 729 F.2d at 1498 (because “Attorney General was responsible for appointing” the challenged officers, “[r]equiring appellants to convince the Attorney General to file a *quo warranto* action on their behalf in this case would effectively bar their access to court”). And because all of Mr. Whitaker's actions as Acting Attorney General are *sui generis*, plaintiff will be irreparably harmed if Mr. Whitaker is permitted to do so. *See Landry*,

204 F.3d at 1131. Thus, the Court should enjoin Mr. Whitaker from making the decision and enjoin Mr. Rosenstein to act on plaintiff's request for a writ.

CLAIM III: WRIT OF *QUO WARRANTO*

30. Plaintiff realleges and incorporates herein by reference every allegation and paragraph set forth above.

31. Under D.C. Code § 16-3503, “[i]f the Attorney General or United States attorney refuses to institute a *quo warranto* proceeding on the request of a person interested, the interested person may apply to the court by certified petition for leave to have the writ issued.” *See Acting Officers*, 6 Op. O.L.C. 119, 122 (Jan. 27, 1982) (“As a rule, the authority of *de facto* officers can be challenged only in special proceedings in the nature of *quo warranto* brought directly for that purpose.”).

32. As noted, the Department of Justice has taken the formal position that Mr. Whitaker's service as Acting Attorney General is both constitutional and lawful in a brief filed in Mr. Michaels' case. This is as a constructive denial of plaintiff's request to the Acting Attorney General, and awaiting any response is futile. *See Exhibit, infra; cf. Andrade*, 729 F.2d at 1498 (because “Attorney General was responsible for appointing” the challenged officers, “[r]equiring appellants to convince the Attorney General to file a *quo warranto* action on their behalf in this case would effectively bar their access to court”); 65 Am. Jur. 2d Quo Warranto § 64 (“A private person with standing may also be permitted to bring a *quo warranto* action where it would be futile to seek the approval of the attorney general or local district attorney.”).

33. In the event that the Court enjoins Mr. Whitaker from deciding whether to act on plaintiff's request and directs Mr. Rosenstein to consider it, and he refuses, a writ of *quo warranto* is justified on plaintiff's petition directly to this Court. As set forth in the motion and memorandum at DE 2,

3, Mr. Whitaker “unlawfully holds or exercises . . . a public office of the United States.” D.C. Code § 16-3501.

34. Moreover, plaintiff is an “interested person” who “may apply to the court by certified petition for leave to have the writ issued,” D.C. Code § 16-3503, for the same reasons that plaintiff will suffer irreparable harm absent an injunction, set forth above, and because Mr. Whitaker has exercised supervisory authority over the Supreme Court litigation. *See SW Gen., Inc.*, 796 F.3d at 81; *Andrade*, 729 F.2d at 1498-99; *cf. Newman v. U.S. of Am. ex rel. Frizzell*, 238 U.S. 537, 551 (1915) (recognizing that “there might be cases under the civil service law in which the relator would have an interest and therefore a right to be heard” under *quo warranto*).

CLAIM IV: DECLARATORY JUDGMENT

35. Plaintiff realleges and incorporates herein by reference every allegation and paragraph set forth above.

36. Plaintiff is entitled to a declaration that Mr. Whitaker is not the Acting Attorney General, that Rod Rosenstein is, and that Noel Francisco and Mr. Rosenstein must reassess plaintiff’s Supreme Court case. Plaintiff is also entitled to a declaration that only Mr. Rosenstein may act on plaintiff’s request for a writ of *quo warranto* against Mr. Whitaker. This Court has authority to issue a declaratory judgment based on the causes of action set forth above. *See* 28 U.S.C. §§ 2201-2202.

REQUEST FOR RELIEF

For the foregoing reasons, as well as those set forth in the motion and memorandum for injunction at DE 2, 3, plaintiff respectfully requests that the Court expeditiously enter an ORDER that:

(1) Enjoins Matthew G. Whitaker from supervising the Department of Justice's response to plaintiff's pending petition for writ of certiorari and subsequent briefing in the U.S. Supreme Court on the merits of the case;

(2) Enjoins the Government from filing a response to plaintiff's pending petition for writ of certiorari in the U.S. Supreme Court, until Rod J. Rosenstein and Noel J. Francisco reassess plaintiff's petition and the merits of the case exclusive of any involvement by Matthew G. Whitaker, and the Government prepares a response exclusively under the ultimate supervision of Rod J. Rosenstein;

Plaintiff also respectfully requests that the Court enter an ORDER that:

(1) Declares that Rod J. Rosenstein is the Acting Attorney General;

(2) Declares that Rod J. Rosenstein and Noel J. Francisco must reassess the petition and merits of plaintiff's Supreme Court case, because of Matthew G. Whitaker's previous oversight and direct involvement;

(3) Declares that Rod J. Rosenstein is the only official who may decide whether to act on plaintiff's request that the Acting Attorney General seek a writ of *quo warranto* under D.C. Code § 16-3502 against Matthew G. Whitaker that he is not the Acting Attorney General;

(4) Declares that Matthew G. Whitaker's appointment as Acting Attorney General violated the Appointments Clause and the Attorney General Succession Act;

(5) Enjoins the Government to prepare a response to plaintiff's pending petition for writ of certiorari and subsequent briefing in the U.S. Supreme Court on the merits of the case exclusively under the ultimate supervision of Rod J. Rosenstein;

(6) Enjoins Rod J. Rosenstein and Noel J. Francisco to reassess the petition and merits of plaintiff's Supreme Court case;

- (7) Enjoins Noel J. Francisco from consulting with Matthew G. Whitaker on plaintiff's Supreme Court case;
- (8) Enjoins Matthew G. Whitaker from:
- a. Exercising authority as Acting Attorney General;
 - b. Deciding whether to act on plaintiff's pending request before the Attorney General to seek a writ of *quo warranto* under D.C. Code § 16-3502.
- (9) Grants a writ of *quo warranto* that Matthew G. Whitaker is not the Acting Attorney General;
- (10) Any other relief the Court deems just and appropriate.

By: /s/ Thomas C. Goldstein

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December 13, 2018

Office of the Attorney General
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Re: Request for the Acting Attorney General to seek a writ of *quo warranto* against Matthew G. Whitaker.

To the Acting Attorney General:

I write on behalf of myself and my client, Barry Michaels.

We request that the Acting Attorney General seek a writ of *quo warranto* under D.C. Code § 16-3502 to enjoin Matthew Whitaker from exercising authority as Acting Attorney General.

The Acting Attorney General should grant this request because Mr. Whitaker is prohibited from serving as Acting Attorney General under the Constitution's Appointments Clause, U.S. Const. art. II, § 2, cl. 2, the Vacancies Reform Act, 5 U.S.C. § 3345 *et seq.*, and the Attorney General Succession Act, 28 U.S.C. § 508. As a matter of law, the correct Acting Attorney General is Rod Rosenstein.

Although not necessary to make this request, Mr. Michaels has a direct interest in it. The Acting Attorney General oversees the litigation on behalf of the United States in an action brought by Mr. Michaels. Further, the Acting Attorney General has the authority to determine whether the United States will defend the constitutionality of the statute challenged by Mr. Michaels in that case. *See* Petition for Writ of Certiorari at 1, 12-15, *Michaels v. Whitaker*, No. 18-496 (S. Ct. Jun. 27, 2018). Further, the Acting Attorney General is the defendant in that suit and must be properly substituted in it.

The Department of Justice—under Mr. Whitaker's supervision—has taken the formal position that Mr. Whitaker's service as Acting Attorney General is both constitutional and lawful. It did so in a brief filed in Mr. Michaels' case. We regard that filing as a constructive denial of this request. We also conclude that awaiting any response to this letter would be futile. If either of those is incorrect, please notify me immediately and affirmatively represent that Mr. Whitaker is genuinely

December 13, 2018

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considering reversing himself and seeking an order that the President appointed him unconstitutionally and illegally. But for avoidance of doubt, we request that the Acting Attorney General formally respond to this request prior to the hearing tomorrow morning on Mr. Michaels' motion for a preliminary injunction in *Michaels v. Whitaker*, No. 18-cv-2906 (D.D.C. Dec. 11, 2018).

Further, in the event any court issues an order either that Mr. Rosenstein is Acting Attorney General or shall consider any request for *quo warranto* relief, we renew this request to Mr. Rosenstein. In that event, the request would no longer be futile.

Thank you for your time and attention.

Respectfully,



Thomas C. Goldstein
tgoldstein@goldsteinrussell.com
(202) 362-0636

CIVIL COVER SHEET

JS-44 (Rev. 6/17 DC)

I. (a) PLAINTIFFS BARRY MICHAELS; and UNITED STATES OF AMERICA ex rel. BARRY MICHAELS (b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF <u>88888</u> (EXCEPT IN U.S. PLAINTIFF CASES)	DEFENDANTS MATTHEW G. WHITAKER, in his official and individual capacities; ROD J. ROSENSTEIN, in his official capacity; and NOEL J. FRANCISCO, in his official capacity COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT _____ (IN U.S. PLAINTIFF CASES ONLY) <small>NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED</small>
(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER) Thomas C. Goldstein, Goldstein & Russell, P.C., 7475 Wisconsin Ave., Suite 850, Bethesda, MD 20814 (202) 362-0636; and Michael Zapin, 20283 State Rd. 7, Suite 400, Boca Raton, FL 33498 (561) 367-1444	ATTORNEYS (IF KNOWN) Cesar A. Lopez-Morales, U.S. Dep't of Justice, 1100 L St., NW, Washington, DC 20530 (202) 305-8550; and Hashim M. Mooppan, U.S. Dep't of Justice, 950 Pennsylvania Ave., NW, Washington, DC 20530 (202) 307-5906

II. BASIS OF JURISDICTION (PLACE AN x IN ONE BOX ONLY) <div style="display: flex; justify-content: space-between;"> <div style="width: 48%;"> <input type="radio"/> 1 U.S. Government Plaintiff </div> <div style="width: 48%;"> <input type="radio"/> 3 Federal Question (U.S. Government Not a Party) </div> </div> <div style="display: flex; justify-content: space-between; margin-top: 10px;"> <div style="width: 48%;"> <input checked="" type="radio"/> 2 U.S. Government Defendant </div> <div style="width: 48%;"> <input type="radio"/> 4 Diversity (Indicate Citizenship of Parties in item III) </div> </div>	III. CITIZENSHIP OF PRINCIPAL PARTIES (PLACE AN x IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT) FOR DIVERSITY CASES ONLY! <table style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th></th> <th style="text-align: center;">PTF</th> <th style="text-align: center;">DFT</th> <th></th> <th style="text-align: center;">PTF</th> <th style="text-align: center;">DFT</th> </tr> </thead> <tbody> <tr> <td>Citizen of this State</td> <td style="text-align: center;"><input type="radio"/> 1</td> <td style="text-align: center;"><input type="radio"/> 1</td> <td>Incorporated or Principal Place of Business in This State</td> <td style="text-align: center;"><input type="radio"/> 4</td> <td style="text-align: center;"><input type="radio"/> 4</td> </tr> <tr> <td>Citizen of Another State</td> <td style="text-align: center;"><input type="radio"/> 2</td> <td style="text-align: center;"><input type="radio"/> 2</td> <td>Incorporated and Principal Place of Business in Another State</td> <td style="text-align: center;"><input type="radio"/> 5</td> <td style="text-align: center;"><input type="radio"/> 5</td> </tr> <tr> <td>Citizen or Subject of a Foreign Country</td> <td style="text-align: center;"><input type="radio"/> 3</td> <td style="text-align: center;"><input type="radio"/> 3</td> <td>Foreign Nation</td> <td style="text-align: center;"><input type="radio"/> 6</td> <td style="text-align: center;"><input type="radio"/> 6</td> </tr> </tbody> </table>		PTF	DFT		PTF	DFT	Citizen of this State	<input type="radio"/> 1	<input type="radio"/> 1	Incorporated or Principal Place of Business in This State	<input type="radio"/> 4	<input type="radio"/> 4	Citizen of Another State	<input type="radio"/> 2	<input type="radio"/> 2	Incorporated and Principal Place of Business in Another State	<input type="radio"/> 5	<input type="radio"/> 5	Citizen or Subject of a Foreign Country	<input type="radio"/> 3	<input type="radio"/> 3	Foreign Nation	<input type="radio"/> 6	<input type="radio"/> 6
	PTF	DFT		PTF	DFT																				
Citizen of this State	<input type="radio"/> 1	<input type="radio"/> 1	Incorporated or Principal Place of Business in This State	<input type="radio"/> 4	<input type="radio"/> 4																				
Citizen of Another State	<input type="radio"/> 2	<input type="radio"/> 2	Incorporated and Principal Place of Business in Another State	<input type="radio"/> 5	<input type="radio"/> 5																				
Citizen or Subject of a Foreign Country	<input type="radio"/> 3	<input type="radio"/> 3	Foreign Nation	<input type="radio"/> 6	<input type="radio"/> 6																				

IV. CASE ASSIGNMENT AND NATURE OF SUIT

(Place an X in one category, A-N, that best represents your Cause of Action and one in a corresponding Nature of Suit)

<input type="radio"/> A. Antitrust <input type="checkbox"/> 410 Antitrust	<input type="radio"/> B. Personal Injury/Malpractice <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Medical Malpractice <input type="checkbox"/> 365 Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Product Liability	<input type="radio"/> C. Administrative Agency Review <input type="checkbox"/> 151 Medicare Act <u>Social Security</u> <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <u>Other Statutes</u> <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 890 Other Statutory Actions (If Administrative Agency is Involved)	<input checked="" type="radio"/> D. Temporary Restraining Order/Preliminary Injunction Any nature of suit from any category may be selected for this category of case assignment. *(If Antitrust, then A governs)*
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<input type="radio"/> E. General Civil (Other)	<input type="radio"/> F. Pro Se General Civil
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<u>Real Property</u> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent, Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property <u>Personal Property</u> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<u>Bankruptcy</u> <input type="checkbox"/> 422 Appeal 27 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <u>Prisoner Petitions</u> <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Conditions <input type="checkbox"/> 560 Civil Detainee – Conditions of Confinement <u>Property Rights</u> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 835 Patent – Abbreviated New Drug Application <input type="checkbox"/> 840 Trademark	<u>Federal Tax Suits</u> <input type="checkbox"/> 870 Taxes (US plaintiff or defendant) <input type="checkbox"/> 871 IRS-Third Party 26 USC 7609 <u>Forfeiture/Penalty</u> <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other <u>Other Statutes</u> <input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 430 Banks & Banking <input type="checkbox"/> 450 Commerce/ICC Rates/etc. <input type="checkbox"/> 460 Deportation	<input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions <input type="checkbox"/> 470 Racketeer Influenced & Corrupt Organization <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Satellite TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes <input type="checkbox"/> 890 Other Statutory Actions (if not administrative agency review or Privacy Act)
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<input type="radio"/> G. Habeas Corpus/ 2255 <input type="checkbox"/> 530 Habeas Corpus – General <input type="checkbox"/> 510 Motion/Vacate Sentence <input type="checkbox"/> 463 Habeas Corpus – Alien Detainee	<input type="radio"/> H. Employment Discrimination <input type="checkbox"/> 442 Civil Rights – Employment (criteria: race, gender/sex, national origin, discrimination, disability, age, religion, retaliation) *(If pro se, select this deck)*	<input type="radio"/> I. FOIA/Privacy Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 890 Other Statutory Actions (if Privacy Act) *(If pro se, select this deck)*	<input type="radio"/> J. Student Loan <input type="checkbox"/> 152 Recovery of Defaulted Student Loan (excluding veterans)
<input type="radio"/> K. Labor/ERISA (non-employment) <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 740 Labor Railway Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="radio"/> L. Other Civil Rights (non-employment) <input type="checkbox"/> 441 Voting (if not Voting Rights Act) <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 445 Americans w/Disabilities – Employment <input type="checkbox"/> 446 Americans w/Disabilities – Other <input type="checkbox"/> 448 Education	<input type="radio"/> M. Contract <input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholder's Suits <input type="checkbox"/> 190 Other Contracts <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<input type="radio"/> N. Three-Judge Court <input type="checkbox"/> 441 Civil Rights – Voting (if Voting Rights Act)

V. ORIGIN
☒ 1 Original Proceeding
 ☐ 2 Removed from State Court
 ☐ 3 Remanded from Appellate Court
 ☐ 4 Reinstated or Reopened
 ☐ 5 Transferred from another district (specify)
 ☐ 6 Multi-district Litigation
 ☐ 7 Appeal to District Judge from Mag. Judge
 ☐ 8 Multi-district Litigation – Direct File

VI. CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE.)
 28 U.S.C. §§ 2201-2202, D.C. Code §§ 16-3501-3503, implied equitable claim under 135 S. Ct. 1378 (2015).

VII. REQUESTED IN COMPLAINT	CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 <input type="checkbox"/>	DEMAND \$	JURY DEMAND: YES <input type="checkbox"/> NO <input checked="" type="checkbox"/>
VIII. RELATED CASE(S) IF ANY	(See instruction)	YES <input checked="" type="checkbox"/> NO <input type="checkbox"/>	If yes, please complete related case form

DATE: Dec. 13, 2018	SIGNATURE OF ATTORNEY OF RECORD: /s/ Thomas C. Goldstein
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INSTRUCTIONS FOR COMPLETING CIVIL COVER SHEET JS-44
 Authority for Civil Cover Sheet

The JS-44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and services of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. Listed below are tips for completing the civil cover sheet. These tips coincide with the Roman Numerals on the cover sheet.

- I.** COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF/DEFENDANT (b) County of residence: Use 11001 to indicate plaintiff if resident of Washington, DC, 88888 if plaintiff is resident of United States but not Washington, DC, and 99999 if plaintiff is outside the United States.
- III.** CITIZENSHIP OF PRINCIPAL PARTIES: This section is completed only if diversity of citizenship was selected as the Basis of Jurisdiction under Section II.
- IV.** CASE ASSIGNMENT AND NATURE OF SUIT: The assignment of a judge to your case will depend on the category you select that best represents the primary cause of action found in your complaint. You may select only one category. You must also select one corresponding nature of suit found under the category of the case.
- VI.** CAUSE OF ACTION: Cite the U.S. Civil Statute under which you are filing and write a brief statement of the primary cause.
- VIII.** RELATED CASE(S), IF ANY: If you indicated that there is a related case, you must complete a related case form, which may be obtained from the Clerk's Office.

Because of the need for accurate and complete information, you should ensure the accuracy of the information provided prior to signing the form.

District of Columbia

Defendant(s)

Civil Action No. 18-cv-2906

Signature of Clerk or Deputy Clerk

District of Columbia

Defendant(s)

Civil Action No. 18-cv-2906

Signature of Clerk or Deputy Clerk

District of Columbia

Defendant(s)

Civil Action No. 18-cv-2906

Signature of Clerk or Deputy Clerk